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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted]/160

ELY A. LANDAU,

Appellant,

v.

JOSEPH BEST, EVELYN BEST, et al.,

Appellees.

On Appeal From the Supreme Court of the State of Delaware

JURISDICTIONAL STATEMENT

JUSTIN M. GOLDSTOCK,
Attorney for Appellant,
Office & P. O. Address,
60 East 42nd Street,
New York 17, N. Y.

LEONARD W. WAGMAN,
C. DANIEL CHILL,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1962

No.

ELY A. LANDAU,

Appellant,

v.

JOSEPH BEST, EVELYN BEST, et al.,

Appellees.

On Appeal From the Supreme Court of the State of Delaware

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment and mandate of the Supreme Court of the State of Delaware entered on December 27, 1962 in the Office of the Clerk of the Supreme Court of the State of Delaware, which affirmed an Order of the Court of Chancery of the State of Delaware, in and for New Castle County, which Order had, in turn, affirmed an *ex parte* order of seizure and sequestration and denied defendants' motion to quash such order of seizure and sequestration. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Delaware (per Southerland, *C. J.*) is reported at 187 A. 2nd 75 (Appendix A, *infra*, pp. 1a-7a). The final judgment and mandate issued

pursuant to that opinion is reproduced at pages 8a, 9a of Appendix A, *infra*.

The opinion of the Chancery Court of the State of Delaware, in and for New Castle County (per Short, V. *Ch.*), rendered on April 4, 1962, is not reported. A copy of that opinion appears at pages 10a-15a of Appendix A, *infra*.

The order of sequestration which is the genesis of this appeal was issued on April 3, 1961 and was issued *ex parte* and not accompanied by any opinion. It is reprinted as Appendix D hereto.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the decision and judgment of the Delaware Supreme Court is conferred by 28 U. S. C. 1257 (2) and 2101(c). The final judgment and mandate of the Supreme Court of the State of Delaware was rendered December 27, 1962 and the final mandate issued thereon was filed in the Court of Chancery of the State of Delaware, in and for New Castle County, on the 31st of December, 1962.

A Notice of Appeal from the aforesaid judgment was filed by the appellant in the Delaware Supreme Court and in the Court of Chancery of the State of Delaware in and for New Castle County on March 26, 1963.

The aforesaid final judgment and mandate affirmed the decision of the Chancery Court of the State of Delaware, in and for New Castle County, which had been rendered on April 4, 1962 and which affirmed an *ex parte* order of seizure and sequestration which had been granted to the appellees on April 3, 1961.

The jurisdiction of this Court to review by direct appeal the judgment entered below arises from the Delaware Court's affirmance of the validity of 10 Delaware Code, § 366, in the face of appellant's attack on the ground that the enforcement and application of said statute herein

failed to give full faith and credit to the statutory and decisional law of the State of New York and deprived appellant of his property without affording him due process of law. *Home Insurance Company, et al.* v. *Dick*, 281 U. S. 397, 74 L. ed. 926; *Perkins* v. *Benguet Consol. Mining Co.*, 342 U. S. 437, 96 L. ed. 485; *Hughes* v. *Fetter*, 341 U. S. 609, 95 L. ed. 1212; *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Company*, 292 U. S. 143, 78 L. ed. 1178.

Statutes Involved

Sections 260 through 262 of the Personal Property Law of the State of New York, Section 366 of Title 10 of the Delaware Code (Courts and Judicial Procedure) and the pertinent portions of Article IV and Amendment XIV of the United States Constitution are set forth in Appendix B hereto.

Questions Presented

In this derivative stockholders' action the record shows that neither the appellees nor the appellant were citizens or residents of the State of Delaware in whose courts the action was commenced. It was conceded below that personal jurisdiction could not have been obtained over the appellant. Pursuant to the Delaware sequestration statute, the plaintiffs (appellees) obtained an *ex parte* order which purported to direct the seizure and sequestration of debentures owned by the appellant and situated outside the State of Delaware. To paraphrase Mr. Justice Burton, in *Perkins* v. *Benguet Consol. Min. Co.*, 342 U. S. 437, 445, 96 L. ed. 485, 492, "The essence of the issue here, at the constitutional level, is * * * one of general fairness to the" appellant. Placed in the proper perspective for review on apeal to this Court, the issues at bar are phrased as follows:

Under the circumstances revealed by the record and as summarized in the statement of the case herinafter set forth.

1. Did the Delaware Court err in not giving full faith and credit to the New York decisional and statutory law governing the seized debentures;

2. Did the Courts below err in failing to find the *ex parte* order of sequestration and the purported seizure of appellant's debentures pursuant to the enabling Delaware statute violative of the due process clause of the Fourteenth Amendment to the United States Constitution;

3. Did the Courts below err in directing the sequestration and seizure of the appellant's debentures in view of the fact that any default judgment entered against the appellant and his debentures would not be entitled to full faith and credit and would therefore expose the appellant to possible multiple claims.

Statement of the Case

This action was commenced against the appellant, a resident of the State of New York, by the *ex parte* issuance of an order by the Delaware Chancery Court appointing a sequestrator and directing that the sequestrator "seize and hold * * * property of each of the aforesaid named defendants in the State of Delaware, consisting of shares of stock, options on shares of common stock and debentures of National Theatres & Television, Inc., a Delaware corporation." (Appendix D, p. 24a).

This appeal contests the propriety and constitutionality of the statutory provision contained in 10 Delaware Code, Section 366 pursuant to which the Delaware Courts authorized and affirmed the *ex parte* seizure and sequestration herein; and this appeal contests the order as issued and enforced against the appellant.

The aforesaid order permitting and directing such sequestration was issued on April 3, 1961 and is reproduced at Appendix D herein, at pages 24a-27a, *infra*.

The complaint herein purports to institute a stockholders' derivative action brought on behalf of National Theatres & Television, Inc., now known as National General Corp., a Delaware corporation (sometimes hereinafter referred to as "National").

The complaint was filed on March 29, 1961 and on April 3, 1961 plaintiffs (appellees) obtained an *ex parte* order from the Chancery Court providing for the appointment of a sequestrator and directing him to seize property in the State of Delaware belonging to the individual defendants "consisting of shares of stock, options on shares of common stock and debentures" of National. The report of the sequestrator states that he seized $421,000 in principal amount of "bonds" (debentures) registered in the name of the appellant. The action of the Delaware Court and the sequestrator was taken pursuant to the provisions of Section 366 of Title 10 of the Delaware Code; the text of this section is set forth at Appendix B, pp. 19a, 20a, *infra*.

Neither the appellee nor the appellant are citizens or residents of Delaware. It is conceded that personal jurisdiction could not have been obtained over the appellant in Delaware. The record shows that the "bonds" (debentures) purportedly seized were not physically located in Delaware. Payments of principal and interest upon the debentures were to be made in New York where the Trustee and the sinking fund were located. By the very terms of the debenture, the law of the State of New York was to be the law governing the rights and obligations of those who came in contact with the debenture. A copy of the debenture is submitted herewith as Appendix C. Even National, the issuing corporation, did not conduct business in nor did it have its place of business in Delaware.

The wording of the Delaware Statute reveals that the purpose of the sequestration was to enable the Delaware

Court to enter a default judgment and direct the sale of the debentures thus seized.

The appellant appeared specially in the Delaware Chancery Court and moved to vacate the purported seizure and sequestration of his debentures. In his notice of motion, supported by affidavit presenting substantiating facts, appellant urged (1) that the debentures were negotiable, having been created in New York and declared so under New York law which by the terms of the debenture was the governing law; (2) that these debentures were not located in Delaware and therefore that State was powerless to direct their seizure where the appellant was also absent and a non-resident, and to do so would be a deprivation of the appellant's right to due process of law as guaranteed by Amendment XIV of the federal constitution; and (3) that as a concomitant of the foregoing factors, the intended sale of the seized debentures pursuant to a default judgment would not be entitled to full faith and credit and that this was particularly so as to the sister state where the debentures had their situs, which would be the place where any purchaser from the sequestrator would have to obtain possession of the debentures.

The opinion of the Court of Chancery (Short, Vice Ch.), rendered on April 4, 1962, rejected appellant's contention that the debentures were negotiable under New York law, conceding that if they were negotiable, prior Delaware decisions and a decision of this Court would support appellant's position that these debentures were not subject to seizure and sequestration in Delaware. The Court said, "If, by the law of New York, the debentures are negotiable instruments, then it is clear that this court should not assume to seize the debt represented thereby since the court has no personal jurisdiction over Landau and the seizure would not be regarded as *res judicata*. *Bank of Jasper* v. *First National Bank of Rome, Ga.*, 258 U. S. 112, 42 S. Ct. 202, 66 L. ed. 490."

The learned Vice Chancellor looked to the provisions of the debenture, measured them against the New York cases and statutes and held them to be non-negotiable. It is this finding we respectfully submit to be error of such a degree that appeal to this court is warranted for, in so ruling, the Delaware Court did not apply the New York law to the debentures at bar in the same manner as a New York Court would have ruled. In so ruling, the Chancery Court also denied the appellant's right to due process of law under the Fourteenth Amendment. (*Hartford A. & I. Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 150, 78 L. ed. 1178, 1182).

On appeal to the Delaware Supreme Court the appellant urged once again the arguments summarized above which had been set forth as the basis for this motion to vacate the sequestration. In addition, it was urged with renewed vigor that the decision of the vice-chancellor had denied full faith and credit to the New York law, in that, while recognizing that the New York law governed the pivotal issue, the Vice-Chancellor had failed to apply New York law in the manner that would lead to the same conclusion as would be reached by a New York court were it to be presented with the issue as to these debentures.

The Decision Below

The decision of the Supreme Court of the State of Delaware (Appendix A, pp. 1a-7a, *infra*), upon which the judgment was rendered upholding the sequestration and seizure of appellant's debentures, failed to give the New York governing statute its intended application. While the Court below recognized the existence of the New York statute, it held "the Hofstadter Act is inapplicable" to the debenture at bar. In failing to give the Hofstadter Act what we respectfully submit is its obvious scope, the Delaware Court reached a conclusion inconsistent with that which would be

attained were the circumstances at bar to be presented to a New York Court. In this manner, the Delaware Court subverted the governing principles of full faith and credit enunciated by this Supreme Court in *Hughes* v. *Fetter*, 341 U. S. 609, 612-613, 95 L. ed. 1212, 1216, 1217, and *First National Bank* v. *United Airlines*, 342 U. S. 396, 400, 96 L. ed. 441, 446.

Chief Justice Southerland, of the Delaware Supreme Court, paid only passing notice to Section 261 of the New York Personal Property Law and gave the pertinent language thereof a reading so restrictive as to deprive that statute of all vitality. He wrote, "For § 261 to apply the bond must also provide, 'in substance, that title thereto is transferable with the same effect as in the case of a negotiable instrument. * * *'" Having thus discerned the course to follow, the learned Justice below failed to pursue the logical path that ensued, preferring instead to detour along the shadowy route of title. "Title (to the debentures) is transferable only on the books of the Trustees." He held, "Hence the Hofstadter Act is inapplicable." In so doing, the lower Court completely ignored the appellant's presentation of the New York law, the provisions of the bond and the uniform custom of the commercial community, which established that these debentures were negotiable.

The Questions Are Substantial

1. In order for a court to adjudicate rights in property or to divest the owner thereof of any right, title or interest therein, it must have jurisdiction over either the owner (*in personam* jurisdiction) or the property itself (*in rem* or *quasi in rem* jurisdiction).

A state's purporting to adjudicate rights in property in the absence of personal or *in rem* jurisdiction is, of course, a violation of the Due Process clause embodied in Amendment XIV to the Constitution of the United States;

a determination so made is of no legal effect and is not entitled to full faith and credit.

E.g., *Pennoyer* v. *Neff*, 95 U. S. 714, at p. 722, 24 L. Ed. 565, at p. 568.

Turning to the facts of the case at bar, it is quite clear that the courts of Delaware have no personal jurisdiction over the appellant. That point is not in issue at all.

Neither do the courts of Delaware have such jurisdiction over the *res*, the negotiable bonds, as will empower them to enter a binding decree. Those bonds are located outside of Delaware and the Delaware courts cannot acquire *in rem* or *quasi in rem* jurisdiction over them.

> *Bank of Jasper* v. *First National Bank of Rome, Georgia* (258 U. S. 112, 42 S. Ct. 202, 66 L. Ed. 490).

The *Bank of Jasper* case, *supra*, is undoubtedly the leading case on the subject of an ineffective attempt to exercise *in rem* jurisdiction over a negotiable instrument, located outside the boundaries of a state, by serving the maker of the instrument within the state. The facts of that case, are virtually identical with the facts in the case at bar and the decision by this Court in that case controls the issue here.

The principle established in *Bank of Jasper*, was that negotiable instruments have a situs—for purposes of jurisdiction—only where they are physically located or where their holder is situated.

In *Jasper*, the Supreme Court concluded,

> "As neither the certificates of deposit nor the holder thereof were within the state of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder." (258 U. S., supra, at p. 119, 66 L. Ed. at p. 495.)

We have thus a definite holding by this Court that for jurisdictional purposes the situs of a negotiable instrument is the place where the instrument is located. At least for jurisdictional purposes the underlying debt merges in the instrument and is not a thing apart. This is, after all, the heart of the concept of negotiability.

The principle enunciated in *Bank of Jasper* was recognized below by the Delaware courts (Appendix, pp. 2a, 12a). The Courts below further conceded that New York law was to govern the question of negotiability of the debentures.

2. The Delaware courts failed to give full faith and credit to the New York law which concededly governed the issue at bar and which declares these debentures to be negotiable. The courts below found that the registration feature contained in these debentures rendered them non-negotiable. It is this finding which we specifically submit fails to give the New York law the same scope and effect it would be given under these circumstances by the Courts of New York.

This Court has frequently recognized the necessity for a uniform national commercial system.

> "1. In the field of commercial law—where certainty is of high importance—we have often imposed a rather rigid rule that a State must defer to the law of the State of incorporation, or to the law of the place of contract. Thus, in Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 55 S. Ct. 589, 100 A. L. R. 1133, we held that New Jersey could not close its courts to suits which involved stockholder liability arising under the laws of New York. We had already said, in Converse v. Hamilton, 224 U. S. 243, 260, 56 L. ed. 749, 755, 32 S. Ct. 415, Ann. Cas. 1913D, 1292, that such liability was 'peculiarly within the regulatory power' of the State of incorporation: 'so much so that no other State properly can be said to have any public policy thereon.' In John Hancock Mut. L. Ins. Co. v. Yates, 299 U. S. 178 81 L. ed. 106, 57 S. Ct.

> 129; we held that the Georgia courts had to give full faith and credit to a New York parol evidence statute which prevented recovery on an insurance contract made in New York. In both these cases, the Court, speaking through Mr. Justice Brandeis, emphasized that it was the particular relationship involved which made the Full Faith and Credit Clause applicable." (Frankfurter, J. dissenting with Justices Reed, Jackson and Minton in *Hughes* v. *Fetter*, 341 U. S. 609, 615, 95 L. ed. 1218.)'

In the case at bar, it is clear that the overriding considerations are that (1) the "contract" was made in New York, (2) the holder of the instrument, the appellant is in New York where the instrument is located; (3) the transfer agent—who is to retain the sinking fund and to pay principal and interest upon the debenture is also located only in New York where those acts are to be performed. This uniformity in reference to the commercial instrument in question and the rights of those who come in contact therewith is to be achieved only through the application of New York law as New York's courts would apply it, to the instrument at bar. To permit the decision appealed from to stand would permit different results to be reached by the New York courts and the Delaware courts in reference to these debentures.

Analysis of the Pertinent Provisions of the New York Personal Property Law

To show the error committed in failing to give the New York law the natural interpretation to which it was entitled under the sovereign principle of full faith and credit, it is necessary to analyze the New York statute.

Section 261 of the New York Personal Property Law renders negotiable three types of instruments which had previously been held to be non-negotiable instrument(s) in a strict sense under the Negotiable Instruments Law. The three types of instruments covered by the statute are

security receipts, equipment trust certificates, and those with which we are here concerned, corporate bonds.

Subdivision one of Section 261 covers bearer instruments; we are not here concerned with those. Subdivision 2 covers a "corporate bond which, by its terms, entitles a person named therein to the benefits thereof * * * ". That is the situation at bar.

Subdivision 3 of that section confers upon an innocent holder for value of such instruments the benefits enjoyed by a holder in due course.

The origin of the New York Statute (Personal Property Law, Sections 260-262) popularly known as the Hofstadter Act is comprehensively discussed in a learned opinion in *Application of Goodchild*, 160 Misc. 738, 290 N. Y. S. 683 (1936). It is there pointed out that the Act was originally passed in reply to the decisions of the New York Court of Appeals in cases such as *Manhattan Co.* v. *Morgan*, 242 N. Y. 38, 150 N. E. 594 (1926). In the *Morgan* case, the Court, per Cardozo, J., had held that interim certificates were not negotiable instruments because they did not strictly comply with the technical requirements of the Negotiable Instruments Law. The opinion in *Goodchild*, fully spelled out the background of the New York Law and we take the liberty of quoting the relevant portion of that opinion:

> "The exposition of the court [in the *Morgan* case] ended with the following pregnant paragraph (242 N. Y. 38, at page 52, 150 N. E. 594, 598): 'We do not underrate the importance of permitting business to originate for itself the methods and instrumentalities that may be found by experience to be helpful to its free development. * * * There is force in the argument that wider freedom of choice through the spontaneous flowerings of custom would work a special gain. One of the debit items to be charged against codifying statutes is the possibility of interference with evolutionary growth. It is the ancient

conflict between flexibility and certainty. So far as the Negotiable Instruments Law is concerned, the remedy for the evil, if it be one, is an amendment of the statute that will add to the negotiable instruments there enumerated or described such other classes as the law merchant or the custom of the market may from time to time establish. Until such an amendment shall be adopted, the courts in their decisions must take for granted that the Legislature is content with the law as it is written.'

"Pursuant to this implied suggestion, the Legislature which was at that time in session enacted article 8 of the Personal Property Law, and its terms, when compared with the provisions of the documents in controversy in *Manhattan Company* v. *Morgan*, demonstrate conclusively the purpose of the enactment and the supposed defect in the law at which its remedial provisions were directed." (*Application of Goodchild, supra*, 160 Misc. at p. 749, 290 N. Y. S. at p. 694.)

Article 8, §§ 260-262, of the New York Personal Property Law (added by Laws of 1926, Ch. 704, amended by Laws of 1930, Ch. 630, § 2), is set forth in Appendix B hereto, at pages 16a-18a. The purpose and effect of the Act was to remove the uncertainty that had been occasioned by prior New York decisions which had indicated that registered bonds, while freely transferable and quasi-negotiable, "may not be a negotiable instrument in a strict sense." *Reynolds* v. *Title Guarantee & Trust Co.*, 240 N. Y. 247, 262, 148 N. E. 514 (1925).

"After Reynolds v. Title Guarantee Co., 240 N. Y. 257, 148 N. E. 514 (1925) held registered bonds were not negotiable under the N. I. L., they were made negotiable by the enactment of the Hofstadter Act (Pers. Prop. L., § 260 et seq.)." (1955 Report of the Law Revision Commission of the State of New York, Vol. 3, p. 1900; N. Y. State Legislative Document (1955), No. 65[1], p. 28.) See also "Comment Negotiability of Corporate Bonds—Recent New York Legislation," 40 Yale Law Journal 261 (1930).

See also, *Rothschild* v. *Binghamton First National Bank*, 140 Misc. 499, 251 N. Y. S. 25, aff'd 237 App. Div. 808, 260 N. Y. S. 974 [1st Dept.] aff'd w. o. opinion, 262 N. Y. 559, 188 N. E. 681, where in discussing certain interim certificates possessing features most similar to the registration provisions of the debenture at bar, the Court wrote: "By the provisions of sections 261 and 262 of the Personal Property Law * * * they were placed in the category of negotiable instruments." 140 Misc. at page 503, 251 N. Y. S. at pp. 29-30.

In the landmark New York case of *Reynolds* v. *Title Guarantee & Trust Co.*, Justice Lehman, in discussing similar registration provisions, had written:

> "Though a corporate bond, payable to the 'registered holder,' and by its terms transferable to the holder only upon the books of the trustee, may not be a negotiable instrument in a strict sense (Daniel on Negotiable Instruments [6th Ed.] § 1501b; Scollans v. Rollins, 173 Mass. 275, 53 N. E. 863, 73 Am. St. Rep. 284), yet, as this court said of certificates of stock in New York & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30, 82:
>
> > 'It was never intended to lock up those instruments in the hands of the stockholders named in them—but to give to them every practicable facility as the basis of commercial transactions.'
>
> "Undoubtedly they were intended to pass easily from purchaser to purchaser, and by proper indorsement, ownership, as between seller and purchaser, could be transferred. When the lawful registered holder delivered these bonds properly indorsed to the broker and executed an irrevocable power of attorney for their transfer on the books of the trustee, the broker acquired a right to the bonds which he could protect by compelling a transfer on the books of the trustee."

At the time of its original enactment (Laws of 1926, Ch. 704) the Hofstadter Act covered only security receipts

and equipment trust certificates. However, in 1928, the New York Court of Appeals once again held, as it had earlier in *Reynolds* v. *Title Guarantee & Trust Co.*, 240 N. Y. 247, 148 N. E. 514, *supra*, that corporate bonds, in order to be negotiable, must conform strictly to the technical requirements of the Negotiable Instruments Law, rejecting the doctrine of negotiability by agreement or intent (*Enoch* v. *Brandon*, 249 N. Y. 263, 164 N. E. 45).

To overcome the effect of the *Reynolds* and *Brandon* decisions, the New York State Legislature, in 1930, amended the Hofstadter Act by adding corporate bonds to the list of instruments which are negotiable, although not in strict compliance with the Negotiable Instruments Law (Laws of 1930, Ch. 630, § 2). Moreover, § 262 of the Personal Property Law *expressly* adopts the doctrine of negotiability by agreement with respect to such instruments (Cf. Beutel, Negotiability by Contract, 28 Ill. Law Review 205 [1933]).

In sum, then, notwithstanding the registration requirements, the bonds in question are negotiable instruments under the law of New York.

The attention of the Court below was also drawn to the report of the New York State Law Revision Commission in analyzing Section 8-105 of the Uniform Commercial Code soon to become effective in New York. In that analysis the Commission stated that registered corporate bonds were already negotiable in New York by virtue of the Hofstadter Act (Report of the New York State Law Revision Commission (1955), Vol. 3, page 1932; N. Y. State Legislative Document (1955) No. 65 (I), page 60—wherein it is stated: "The effect of this statute was to impart characteristics of negotiability to bonds even though they were payable only to the registered owner.") Both federal courts and the New York State Courts have placed heavy reliance upon the New York Law Revision Commission's work: *Gramatan-Sullivan, Inc.* v. *Koslow*, 240 F. 2d 523,

527 (dissenting opinion). *Aquilino* v. *United States* (10 N. Y. 2d 271, 176 N. E. 2d 826). *American Blower Corp.* v. *James Talcott, Inc.* (10 N. Y. 2d 282, 176 N. E. 2d 833).

We respectfully submit that upon the foregoing exposition of the New York law it is clear that were the circumstances at bar placed before a New York court the debentures herein would be held subject to seizure and sequestration only in New York by a New York court. The failure of the Delaware courts to recognize what is clearly the New York law on the subject flies in the teeth of the pronouncements of this Court in cases such as *Hughes* v. *Fetter*, 341 U. S. 609, 95 L. ed. 1212 and *First National Bank* v. *United Airlines*, 342 U. S. 396, 96 L. ed. 441.

This failure of the Delaware courts to recognize and give effect to the New York law violates not only the full faith and credit clause but appellant's due process right to have his interests in the seized debentures determined by the law of the state of maximum contracts as unquestionably established by the record. *Hartford A. & I. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 144, 150, 78 L. ed. 1181, 1182.

3. This Court has often held that under circumstances such as those at bar, the interest of the state attempting to exercise authority and jurisdiction must be substantial.

> "Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (Home Ins. Co. v. Dick, supra (281 U. S. 408, 74 L. ed. 933, 50 S. Ct. 338, 74 A. L. R. 701)), it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to

> be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 69 L. ed. 342, 45 S. Ct. 129, supra; Home Ins. Co. v. Dick, supra. Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. Compare Bond v. Hume, 243 U. S. 15, 22, 61 L. ed. 565, 568, 37 S. Ct. 366. But clearly this is not such a case."

Hartford A. & I. Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 150, 78 L. ed. 1178, 1181.

We would be emphasizing the obvious were we to draw the precise parallel between the record at bar and the principles quoted above as enunciated in the *Hartford* case.

4. In *Western Union Teleg. Co.* v. *Pennsylvania*, 368 U. S. 71, 80, 7 L. ed. 2d 139, 145, this Court held that the Pennsylvania courts should have dismissed the case when it became apparent that it could not protect Western Union from multiple claims to the unclaimed sums it held and which Pennsylvania sought to escheat at. Justice Stewart concurred on the separate ground that the undelivered money orders and drafts were located in New York and only New York could escheat the property.

The deprivation of due process incurred by the appellant herein has been rectified by the Court on previous occasions:

> "* * * And our prior opinions have recognized that when a state court's jurisdiction purports to be

based, as here, on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment. Anderson Nat. Bank v. Luckett, 321 U. S. 233, 242, 243, 88 L. ed. 692, 702, 703, 64 S. Ct. 599, 151 A. L. R. 824; Security Sav. Bank v. California, 263 U. S. 282, 286-290, 68 L. ed. 301, 306-308, 44 S. Ct. 108, 31 A. L. R. 391."

Western Union Teleg. Co. v. *Pennsylvania*, *supra*, at 368 U. S. 75, 7 L. ed. 142.

Once again, the record at bar parallels an established principle of law clearly stated by this Court. On this record Delaware could not effectively foreclose other claims against the debenture and appellant's interst therein which could be raised in New York where both the appellant and his debentures were situated.

Conclusion

The appellant herein was deprived of his right to due process of law. This Court has recognized that

> "The undue extension of the statutes and authority of a state beyond its own borders by the expedient of rendering a judgment against non-citizens over whose persons or property the state has acquired jurisdiction may infringe due process. Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. ed. 926. * * *" *Pink* v. *A.A.A.*, 314 U. S. 211.

In the case at bar, we respectfully submit, neither *in personam* nor *in rem* jurisdiction was acquired and without this Delaware was powerless to legislate or adjudicate as to appellant's interest in these debentures.

> "But we are aware of no power which the State of domicile of the debtor has to determine the per-

sonal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding. The existence of any such power has been repeatedly denied. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Hart v. Sansom, 110 U. S. 151, 28 L. ed. 101, 3 S. Ct. 586; New York L. Ins. Co. v. Dunlevy, 241 U. S. 518, 60, L. ed. 1140, 36 S. Ct. 613." *Estin* v. *Estin*, 334 U S. 540, at 548, 92 L. ed. at 1568.

In its very attempt to exercise extra-territorial jurisdiction, the Delaware court failed to give full faith and credit to the statutory and decisional law of New York and thus magnified the deprivation of appellant's constitutional rights in view of the absence of any pertinent policy consideration to justify the acts of the Delaware court.

The attempted exercise by Delaware of jurisdiction over appellant's property inevitably exposed the appellant and that property to multiple claims again violating his right to due process of law.

For all of the foregoing reasons, it is respectfully submitted that the questions presented on this appeal are substantial and that this Honorable Court should exercise jurisdiction thereof.

Respectfully submitted,

JUSTIS M. GOLENBOCK,
Attorney for Appellant.

LEONARD W. WAGMAN,
C. DANIEL CHILL,
of Counsel.

APPENDICES

APPENDIX A

Opinion of the Supreme Court of the State of Delaware (per Southerland, C.J.) dated December 13, 1962.

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 47, 1962

ELY A. LANDAU and OLIVER A. UNGER,
Appellants,

vs.

JOSEPH BEST and EVELYN BEST,
Appellees,

and vs.

LEONARD DAVIS and PHILIP L. HANDSMAN,
Appellees.

(December 13, 1962)

SOUTHERLAND, *Chief Justice,* and WOLCOTT and TERRY, *JJ.,* sitting.

Appeal from an order of the Court of Chancery of the State of Delaware denying defendant's motion to quash an order of sequestration. Affirmed.

Bruce M. Stargatt, of Morford, Young & Conaway, of Wilmington, and J. M. Goldenbock, of Goldenbock and Barell, of New York City, for appellants.

Robert H. Richards, Jr., of Richards, Layton & Finger, of Wilmington, and Robert J. Ward, and David A. Drexler of Aranow, Brodsky, Bohlinger, Einhern & Dann, of New York City, for appellees.

Appendix A

SOUTHERLAND, *C.J.*:

This is a stockholder's derivative suit on behalf of National Theatres and Television Inc., a Delaware corporation. Plaintiffs below sought to compel the appearance of certain defendants by seizure of their property under the provisions of *10 Del. C. § 366*, the so-called "sequestration statute." By order of the Court a sequestrator was appointed to seize "shares of stock * * * and debentures" of National Theatres owned by defendants. The sequestrator's report showed that he had seized, among other property, certain debentures of National Theatres registered in the name of Ely A. Landau and others in the name of Oliver A. Unger, two of the defendants. The sequestrator did not take physical possession of the debentures, and the seizure was effected by the making of appropriate entries on the books of the corporation, in accordance with the established practice of the Court.

Thereafter these defendant moved to vacate the seizure on the ground that the debentures are negotiable instruments having no situs in Delaware, which the Court therefore had no power to seize, and that any attempted seizure or sale would be futile. The Vice Chancellor denied the motion and the two defendants appealed. (Unger has since abandoned his appeal.)

The question before us is a very narrow one, viz:

Are the seized debentures negotiable instruments under the law of the State of New York?

This question arises in this way:

Counsel are agreed that if the debentures are negotiable they have no situs in Delaware and may not be seized. *Bank of Jasper v. First National Bank of Rome, Georgia*, 258 U. S. 112, 42 S. Ct. 202.

Counsel are also agreed that the question of negotiability is to be determined by New York law, as specified

in the indenture pursuant to which the debentures were issued.

Counsel are also agreed that if the debentures are non-negotiable the debt represented by them may be seized under Delaware law. *Weinress* v. *Bland*, 31 Del. Ch. 269, 71 A. 2d 59.

Our sole inquiry is therefore this: What is the New York law applicable to these securities?

"The debentures are issuable as 'registered debentures without coupons.'" One of the debentures issued to defendant Landau is payable to "Ely A. Landau, or registered assigns." The debenture also provides:

> "The Corporation, the Trustee, any paying agent and any Debenture registrar may deem and treat the registered Owner hereof as the absolute owner of this Debenture (whether or not this Debenture shall be overdue and notwithstanding any notation of ownership or other writing hereon made by anyone other than the Corporation or any Debenture registrar), for the purpose of receiving payment hereof or on account hereof and for all other purposes, and neither the Corporation nor the Trustee nor any paying agent nor any Debenture registrar shall be affected by any notice to the contrary."

Section 2.05 of the indenture provided in part as follows:

> "Debentures to be exchanged shall be surrendered at the office or agency to be maintained by the Corporation for the purpose as provided in Section 6.02, and the Corporation shall execute and the Trustee shall authenticate and deliver in exchange therefor the Debenture or Debentures which the Debentureholder making the exchange shall be entitled to receive.
>
> The Corporation shall keep, at the office or agency to be maintained by the Corporation for the

purpose as provided in Section 6.02, a register or registers in which, subject to such reasonable regulations as it may prescribe, the Corporation shall register Debentures and shall transfer Debentures as in this Article Two provided. At all reasonable times such register or registers shall be open for inspection by the Trustee. Upon surrender for transfer of any Debenture at such office or agency, the Corporation shall execute and the Trustee shall authenticate and deliver in the name of the transferee or transferees a new Debenture or Debentures for an equal aggregate principal amount. No transfer of any Debenture shall be valid unless made at such office or agency."

In the Court below defendants urged that these debentures are negotiable under two decisions of the Court of Appeals of New York: *Zander* v. *New York Security & Trust Co.*, 178 N. Y. 208, 70 N. E. 449, and *Reynolds* v. *Title Guarantee Co.*, 240 N. Y. 257, 148 N. E. 514. The Vice Chancellor analyzed these decisions and concluded that they did not support defendant's contention. As he pointed out, the instrument before the Court in the Zander case provided that it was "assignable only on the books of the company." That is substantially the provision in the debentures here involved. The Court in the Zander case concluded that from the language of the instrument as a whole it was "not a negotiable instrument."

The subsequent Reynolds case, decided in 1925, holds nothing to the contrary, though it recognizes that the bonds were intended "to pass easily from purchaser to purchaser."

It is unnecessary for us to examine this question further, because in this Court defendants have shifted their ground. They now assert that after the decision in the Reynolds case the legislature amended the New York Per-

sonal Property Law so as to make registered bonds negotiable. This argument appears to us to admit the correctness of the Vice Chancellor's interpretation of the New York decisions. Consequently we turn to the amendatory act now relied upon.

It is known as the Hofstadter Act, and was passed originally in 1926. The 1926 Act added three sections to the New York Personal Property Law, § 260, § 261, and § 262. These new sections related only to security receipts and equipment trust certificates, as defined in the act. § 261 provided for transfer of title by delivery by any person in possession. In 1930 the Hofstadter Act was amended by including "corporate bonds" within the scope of the statute. See § 260 as amended. In addition § 261, relating to negotiation, was also amended. Subdivisions 1 and 2 of that section now provide:

> "1. The title to any security receipt or equipment trust certificate or corporate bond which by its terms entitled the bearer to the benefits thereof, may be transferred by the delivery thereof by any person in possession of the same howsoever such possession may have been acquired.
>
> 2. The title to any security receipt or equipment trust certificate or corporate bond which, by its terms, entitles a person named therein to the benefits thereof and which provides, in substance, that title thereto is transferable with the same effect as in the case of a negotiable instrument, may be transferred by delivery thereof by any person in possession of the same, howsoever such possession may have been acquired if endorsed in blank, or if it is endorsed to a specified person and the delivery is made to such person."

Subdivision 1 is admittedly not applicable since it refers only to bearer bonds. But it is earnestly insisted that the effect of subdivision 2 is to make corporate registered bonds negotiable instruments, because it includes a "corporate bond which, by its terms, entitles *a person named therein* to the benefits thereof * * *." (Emphasis supplied by defendants.) This, it is said, is "our situation."

This argument ignores the remaining language of the statute. For § 261 to apply the bond must also provide, "in substance, that title thereto is transferable with the same effect as in the case of a negotiable instrument * * *."

The applicable provisions of the debentures here involved, quoted above, are to the contrary. Title is transferable only on the books of the trustees. Hence the Hofstadter Act is inapplicable.

Counsel seem to agree that there is no New York decision directly in point upon the matter. At any rate, no New York case cited to us seems to be helpful. We are referred, however, to the remarks of two commentators upon the effect of the Hofstadter Act upon the negotiability of corporate bonds.

They take differing views.

The first comment is found in an article by Roscoe T. Steffen and Harry E. Russell, "Registered Bonds and Negotiability", 47 Harv. L. Rev. 741 (1943). In a footnote on p. 745, the authors refer to the Hofstadter Act in this language:

> "This act as originally adopted, applied only to interim certificates and equipment trust certificates, making them in some measure negotiable, but was later amended to include certain bearer bonds. Registered bonds, however, were not included within the statute."

The second comment is that of a writer of a report to the New York Law Revision Commission in connection with

the Commission's study of a proposed Uniform Commercial Code. After considering the effect of certain amendments relating to negotiable securities, the report says:

> "As a part of the analysis of this provision, its effect upon the following instruments, all of which would be securities under the Code has been considered.
>
> . . . .
>
> "*Registered corporate bonds.* No changes. After *Reynolds v. Title Guarantee Co.*, 240 N. Y. 257, 148 N. E. 514 (1925) held registered bonds were not negotiable instruments under the N. Y. L., they were made negotiable by the enactment of the Hofstadter Act (Pers. Prop. L., § 260 et seq.)"

It is to be noted that neither comment contains any analysis of the language of § 261, subdivision 2. It is our view that the first comment is more nearly correct, because we cannot reconcile the language of the debenture before us with the requirement of the Hofstadter Act that the terms of the bond must provide that title must be transferable as in the case of a negotiable instrument.

Defendant's argument, we think, proves too much. If the framers of the Hofstadter Act had wished to accomplish what defendants contend for, why did they not say plainly that all corporate bonds, registered or unregistered, are negotiable? On the contrary, they recognized the distinction between bearer and registered bonds, and included under the act only such registered bonds as contained language embodying the idea of negotiability.

We are of opinion that the seized debentures are not negotiable instruments under New York law, and that the seizure is valid.

The order of the Vice Chancellor is affirmed.

APPENDIX A

Final Mandate of the Supreme Court of the State of Delaware issued December 27, 1962.

MANDATE

THE SUPREME COURT OF THE STATE OF DELAWARE
To the Honorable the Judges of the Court of Chancery of the State of Delaware in and for New Castle County:

Greeting:

WHEREAS, before you or some of you in a cause entitled as follows:

No. 1438

JOSEPH BEST, et al.

v.

ELY A. LANDAU, et al.

No. 1441

LEONARD DAVIS, et al.

v.

ELY A. LANDAU, et al.

---

a certain judgment or order was entered on the April 3, 1961 and June 30, 1962, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on December 13, 1962, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed.

WITNESS The Honorable Clarence A. Southerland, our Chief Justice at Dover, the first day of January, A. D. 1962.

Issued December 27.

T. E. TOWSEND, JR.,
Clerk of the Supreme Court.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE }
NEW CASTLE COUNTY } ss.:

I, GEORGE J. FISHER, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of a Mandate from the Supreme Court of the State of Delaware in Civil Actions Nos. 1438 and 1441 as the same is on file and remains of record in this Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court at Wilmington, this 22nd day of March A. D. 1963.

GEORGE J. FISHER,
Register in Chancery.

APPENDIX A

Unreported Opinion of the Court of Chancery of the State of Delaware, in and for New Castle County (per Short, Vice Ch.), Dated April 4, 1962.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1438

JOSEPH BEST, et al.,

Plaintiffs,

vs.

B. GERALD CANTOR, et al., (NATIONAL THEATRES & TELEVISION, INC.),

Defendants.

MEMORANDUM OPINION (Unreported)

(April 4, 1962)

ROBERT H. RICHARDS, of Richards, Layton & Finger, Wilmington, Delaware, attorney for plaintiffs. IRVING MORRIS of Cohen & Morris, Wilmington, Delaware, of counsel.

ARTHUR G. LOGAN, of Logan, Marvel, Duffy and Boggs, Wilmington, Delaware, attorney for moving defendants.

SHORT, Vice Chancellor: This is a stockholders' derivative action brought in the right and for the benefit of National Theatres & Television, Inc., a Delaware corporation. On April 3, 1961 an order in sequestration was

entered directing the sequestrator therein named to seize property in this State of the individual defendants "consisting of shares of stock, options on shares of common stock and debentures" of National Theatres. The report of the sequestrator, filed May 3, 1961, states that he seized $421,000 in principal amount of "bonds" (debentures) registered in the name of defendant Ely A. Landau and $402,400 registered in the name of defendant Oliver A. Unger. On May 29, 1961 defendants Landau and Unger filed a motion to vacate the sequestration in part on the ground that the court was without power to seize the debt evidenced by said debentures because the same were negotiable instruments under controlling New York law and did not have a situs in Delaware at the time of the sequestration, nor at any time thereafter.

Plaintiffs contend that the debentures involved are not negotiable instruments and that the issue here raised is, therefore, settled by the decision of this court in Weinreiss v. Bland, 31 Del. Ch. 269, 71 A. 2d 59, wherein then Vice Chancellor Seitz said:

> "I therefore conclude that the indebtedness here involved [evidenced by a non-negotiable promissory note of a Delaware corporation executed and payable in New York and held by a non-resident creditor] is property within the meaning of that term as employed in [10 Del. C. § 366]. 'Mere indebtedness' may, therefore, be sequestered under our statute * * *.
>
> "Since the debt here sought to be sequestered is owed by a Delaware corporation, I conclude that this court has ample jurisdiction over the sequestered corporation. Control of the debtor is important because the court can effectively tell him whom he must pay.

Appendix A

> "* * * [T]he comprehensive terms employed in the sequestration statute would seem to indicate an intent to cover every situation which it was constitutionally possible to cover * * * I can find no policy which would constrain me to construe our sequestration statute as not covering a debt owed by a resident debtor. The fact that the debt is payable in New York does not impress me as a reason for excluding such debts from the operation of the statute * * * I conclude that for the purposes of the application of [10 Del. C. § 366] a debt owed by a debtor domiciled in this State has a situs in Delaware."

The debentures involved are payable to "Landau or registered assigns." They provide that the corporation, the trustee, any paying agent and any debenture registrar may treat the registered owner as the absolute owner of debentures for all purposes and that neither of such persons shall be affected by any notice to the contrary. The indenture under which the debentures were issued specifies that they shall be construed in accordance with New York law. If, by the law of New York, the debentures are negotiable instruments then it is clear that this Court should not assume to seize the debt represented thereby since the Court has no personal jurisdiction over Landau and the seizure would not be regarded as *res judicata*. Bank of Jasper v. First National Bank of Rome, Ga., 258 U. S. 112, 42 S. Ct. 202, 66 L. Ed. 490. If, on the other hand, the debentures are not negotiable instruments under New York law then the seizure complained of is valid and effective. Weinfress v. Bland, supra.

Defendants rely upon Zander v. New York Security Trust Co., 178 N. Y. 208, Reynolds v. Title Guaranty & Trust Co., 240 N. Y. 247, 148 N. E. 514, and Hutchison v.

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* What is said herein with respect to the Landau debentures is equally applicable to the Unger debentures.

Ross, 262 N. Y. 381, 187 N. E. 65 as holding that registered debentures are negotiable instruments under New York law. In each of the cited cases it is significant that though the Uniform Negotiable Instruments Law had been adopted in New York, no mention, other than a casual citation in the Zander case, was made of that act. Consideration of the language used by the Court in the Reynolds and Hutchison cases leads to the conclusion that the Court was not really talking about negotiable instruments as such but was discussing the question of "practicable facility" with respect to the transferability of commercial instruments. Thus, in Reynolds v. Title Guaranty & Trust Co., it was said:

> "Though a corporate bond, payable to the 'registered holder', and by its terms transferable by the holder only upon the books of the trustee, may not be a negotiable instrument in the strict sense . . . Yet, as the Court said of certificates of stock in New York & N.H.R.R. Co. Schuyler, 34 N. Y. 30, 82: 'It was never intended to lock up those instruments in the hands of the stockholders named in them—but to give them every practicable facility as the basis of commercial transactions.' Undoubtedly they were intended to pass easily from purchaser to purchaser, and by proper indorsement, ownership, as between seller and purchaser, could be transferred, when the lawful registered holder delivered these bonds properly indorsed to the broker and executed an irrevocable power of attorney for their transfer on the books of the trustee, the broker acquired a right to the bonds which he could protect by compelling a transfer on the books of the trustee."

And in Hutchison v. Ross the Court was not really discussing negotiability but rather transferability. As in the Reynolds case it spoke of the desirability of making stock

certificates and bonds as freely transferable as their nature would permit. Where the word "negotiability" as applied to registered instruments was used it is quite apparent that the Court was not employing that term in its legal sense, but rather in the broader commercial connotation.

In Zander v. New York Security Trust Co., where the certificate was payable "to the said Carolyn Zander, or her assigns, on the return of this certificate, which is assignable only on the books of the company," the Court said:

> "The instrument before us is payable to the plaintiff or her assigns. While the usual terms employed to confer negotiability on an instrument for the payment of money are to make it payable to order or bearer, still instruments payable to assigns have been held to be negotiable in cases where it was apparent from the whole nature of the instrument and the language employed that such was intended to be their character. (Brainerd v. N.Y. & Harlem R.R. Co., 25 N.Y. 496; City Savings Bank v. Town of Greenburgh, 173 Id. 215. See Negotiable Instruments Law, chap. 612, Laws 1897, Sec. 29.) Therefore, had the first sentence of the certificate terminated with the words 'on return of this certificate' it might be claimed, not without force, that the certificate was intended to be negotiable. But the words quoted are followed by the provision 'which is assignable only on the books of the company'. We think the clear effect and intent of this provision was to render the instrument non-negotiable and to protect the company in dealing with the holder of the certificate as such holder might appear on the books of the company, without liability to third parties to whom, unknown to the defendant, it might have been transferred. If such were not the object we are at a loss to discover any pur-

pose which it was intended to subserve. This construction is fortified by the subsequent provision for reduction of rate of interest or payment of principal upon notice to the address named in the books of the company. We conclude, therefore, that from a consideration of the language of the certificate as a whole it is not a negotiable instrument."

The Zander case, in my opinion, states the New York law with respect to instruments such as those here involved. The difference in language of the payee clause involved in Zander and that here in issue is not, in my opinion, of any moment. The words "on the return of this certificate, which is assignable only on the books of the company" is merely another way of saying "registered." Moreover, in the present debentures there is a clear statement in the instruments themselves that the registered owner is to be treated as the absolute owner for all purposes. I am, therefore, satisfied that under New York law the Landau debentures are non-negotiable instruments. The fact that the debentures were issued in New York under an indenture made in that state, that the trustee is a New York bank charged with the performance of carrying out the trust in New York, that the debentures were physically located in New York and payable from a sinking fund there located, and that National Theatres maintains an agency in New York for the transfer and exchange of the debentures does not, in any way, render these instruments any less the debt of National Theatres. Since the corporation is a Delaware corporation and has issued non-negotiable instruments, the debt thereby represented is subject to sequestration in this state pursuant to 10 Del. C. § 366.

The motion to vacate is therefore denied. Order on notice.

APPENDIX B

New York Personal Property Law, Sections 260 through 263 inclusive (The Hofstadter Act).

Section 260. Definitions.

For the purpose of this article: 1. The term "security receipt" means any writing in and by which the signer sets forth that the person named therein or the bearer is entitled to receive a specified principal amount, par value or number of bonds, notes, debentures, shares of stock, voting trust certificates for shares of stock, scrip or other security or securities of any kind or character, identified or described therein absolutely, or when, as and if received by the signer or upon any other contingency stated or referred to therein.

2. The term "equipment trust certificate" means any writing in and by which the signer sets forth that the person named therein or the bearer is entitled to an interest or a share of a specified principal amount of par value in money in a trust under an identified trust indenture pursuant to the terms of which the title to rolling stock or equipment for use by or on the lines or routes of common carriers or to vessels or other marine equipment, is held by the trustees for the benefit of all the holders of the interests or shares.

3. The term "corporate bond" means any bond, debenture, note or other written corporate obligation, forming part of a series of similar bonds, debentures, notes or other written corporate obligations, issued under or the payment of which is secured by a mortgage or deed of trust of real or personal property or both, or issued under or secured by a collateral trust agreement or any other indenture identified or described in such obligation; and any certificate of a trustee, whether or not so issued or secured,

Appendix B

forming part of a series of similar trustee's certificates, which evidences the right to a share or part of any specified corporate obligation or obligations and the security relating thereto, if there be any such security; and any interest coupon appertaining to any of the foregoing described instruments.

For the purposes of this article, the character of any such security receipt or equipment trust certificate or corporate bond is not affected by the inclusion therein of other provisions not limiting the right of transfer and the negotiable quality thereof as in this article provided. Added L. 1926, c. 704; amended L. 1930, c. 630, § 2, eff. April 21, 1930.

Section 261. Negotiation.

1. The title to any security receipt or equipment trust certificate or corporate bond which by its terms entitles the bearer to the benefits thereof, may be transferred by the delivery thereof by any person in possession of the same howsoever such possession may have been acquired.

2. The title to any security receipt or equipment trust certificate or corporate bond which, by its terms, entitles a person named therein to the benefits thereof and which provides, in substance, that title thereto is transferable with the same effect as in the case of a negotiable instrument may be transferred by delivery thereof by any person in possession of the same howsoever such possession may have been acquired if endorsed in blank, or if it is endorsed to a specified person and the delivery is made to such person.

3. A person to whom title may be transferred, as in this section provided, and who shall have taken any such instrument from any other person for present or antecedent value

and without notice of prior defenses or equities or claims of ownership enforcible against such other person, shall have absolute title thereto free of any defenses enforcible against the claims of ownership of the signer or any prior holder. Any holder of any such security receipt, equipment trust certificate or corporate bond, unless the same has been endorsed to a specified person other than the holder and has not been endorsed in blank by such specified person, shall be deemed prima facie to have title thereto as aforesaid; but when it is shown that the title of any person who has negotiated such instrument is defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder for value and without notice as aforesaid.

4. The provisions of this section shall not be applicable to the transfer of any security receipt, equipment trust certificate or corporate bond, when it is shown that such transfer was made after the date fixed therein for the performance by the signer of his obligations thereunder or, if no date is fixed, after the expiration of a reasonable time after the happening of the contingency upon which the signer became obligated to perform. Added L. 1926, c. 704; amended L. 1930, c. 630, § 2, eff. April 21, 1930.

Section 262. Application of Article.

This article shall not be construed to limit or impair the negotiability or quasi negotiability by agreement or otherwise of any instrument whether or not defined herein. The provisions of this article shall apply only in respect of instruments issued after the date of the taking effect thereof, except that it shall be construed to validate the negotiability or quasi negotiability by agreement of any instrument defined herein which is issued prior to the date of the taking effect hereof. Added L. 1926, c. 704; amended L. 1930, c. 630, § 2, eff. April 21, 1930.

APPENDIX B

Section 366 of Title 10 of the Delaware Code:

"§ 366. Compelling appearance of non-resident defendant

"(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a non-resident of the State of Delaware, the Court may make an order directing such non-resident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such non-resident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for three consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

Appendix B

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law."

APPENDIX B

Article IV of the United States Constitution, in pertinent part, reads as follows:

> "ARTICLE IV. — STATES — RECIPROCAL RELATIONSHIP BETWEEN STATES AND WITH UNITED STATES:
>
> "Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

APPENDIX B

Amendment XIV of the United States Constitution, in pertinent part, reads as follows:

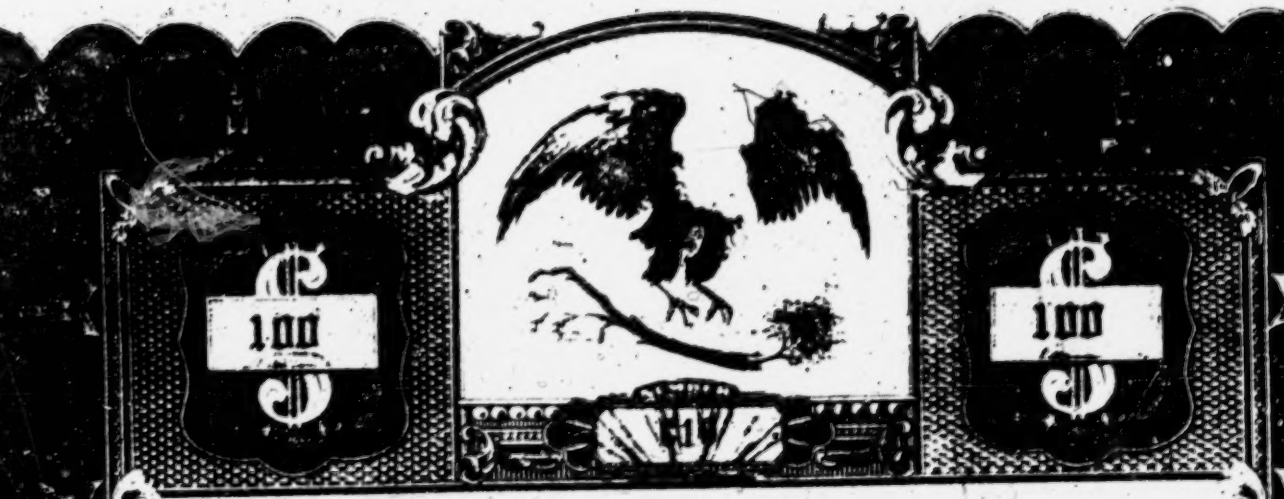
"AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX C

A True Copy of One of the Debentures Involved

(See opposite ☛)



NATIONAL THEATRES, INC.

5½% SINKING FUND SUBORDINATED DEBENTURE

DUE MARCH 1, 1974

NATIONAL THEATRES, INC., a Delaware corporation (herein called the "Corporation"), for value received, hereby promises to pay to -HAROLD GOLDMAN-, or registered assigns, at the office or agency of the Corporation in the Borough of Manhattan, The City of New York, the principal sum of

ONE HUNDRED DOLLARS

on March 1, 1974, in such coin or currency of the United States of America as at the time of payment shall be legal tender for the payment of public and private debts, and to pay interest on said principal sum at the rate of 5½% per annum at said office or agency, in like coin or currency from the date hereof, quarterly on June 1, September 1, December 1 and March 1 of each year, until payment of said principal sum has been made or duly provided for.

This Debenture is one of a duly authorized issue of debentures of the Corporation, designated as its 5½% Sinking Fund Subordinated Debentures Due March 1, 1974 (herein referred to as the "Debentures"), of an aggregate principal amount of $30,000,000, issued or to be issued under and pursuant to an indenture dated as of December 1, 1958 (herein referred to as the "Indenture"), duly executed and delivered by the Corporation to Chemical Corn Exchange Bank, Trustee (herein referred to as the "Trustee"). Reference is hereby made to the Indenture and all indentures supplemental thereto for a description of the rights, limitations of rights, obligations, duties and immunities thereunder of the Trustee, the Corporation and the holders of the Debentures.

In case an Event of Default, as defined in the Indenture, shall have occurred and be continuing, the principal hereof and of all Debentures issued under the Indenture may be declared, and upon such declaration shall become, due and payable in the manner, with the effect, and subject to the conditions, provided in the Indenture.

The indebtedness represented by the Debentures is expressly subordinated, to the extent and in the manner set forth in the Indenture, in right of payment to the prior payment in full of all Senior Indebtedness, as defined in the Indenture, and each holder of the Debentures, by accepting the same, agrees to and shall be bound by the provisions of the Indenture with respect to subordination. The Indenture provides that each holder of a Debenture by his acceptance thereof authorizes and directs the Trustee on his behalf to take such action as may be necessary or appropriate to acknowledge or to effectuate the subordination as provided in the Indenture and appoints the Trustee his attorney in fact for any and all such purposes.

No reference herein to the Indenture and no provision of this Debenture or of the Indenture shall alter or impair the obligation of the Corporation, which is absolute and unconditional, to pay the principal of, premium, if any, and interest on this Debenture at the place, at the respective times, at the rate and in the currency herein prescribed.

The Debentures are issuable as registered Debentures without coupons in the denominations of $100, $500 and $1,000 and any multiple of $1,000. As provided in the Indenture and upon payment of charges as therein provided, the Debentures are exchangeable for other Debentures of the same other authorized denomination or denominations of an equal aggregate principal amount, as requested by the holder surrendering the same at the office or agency of the Corporation in said Borough of Manhattan, provided, however, that Debentures may not be exchanged for Debentures of a lower denomination when such lower denomination is other than $500.

The Debentures are subject to redemption on and after March 1, 1960 [illegible] at the option of the Corporation

The Debentures are also severally subject to redemption quarterly, pursuant to the terms of the sinking fund provided in the Indenture, on notice as set forth above, at 100% of the principal amount thereof, without premium, together with accrued interest to the date fixed for redemption.

The Indenture contains provisions permitting the Corporation and the Trustee, with the consent of the holders of not less than 66⅔% in aggregate principal amount of the Debentures at the time outstanding, evidenced as in the Indenture provided, to execute supplemental indentures adding any provisions to or changing in any manner or eliminating any of the provisions of the Indenture or any supplemental indenture or modifying in any manner the rights of the holders of the Debentures; provided, however, that no such supplemental indenture shall (i) extend the fixed maturity of any Debentures, or reduce the principal amount thereof, or reduce the rate or extend the time of payment of interest thereon, or reduce any premium payable upon the redemption thereof, without the consent of the holder of each Debenture so affected, or (ii) reduce the aforesaid percentage of Debentures, the consent of the holders of which is required for any such supplemental indenture, without the consent of the holders of all Debentures then outstanding. Any such consent by the holder of this Debenture (unless revoked as provided in the Indenture) shall be conclusive and binding upon such holder and upon all future holders and owners of this Debenture and of any Debenture issued in exchange or substitution herefor, irrespective of whether or not any notation of such consent is made upon this Debenture.

This Debenture may be transferred upon surrender at the office or agency of the Corporation in the Borough of Manhattan, The City of New York, for cancellation, accompanied by a written instrument of transfer in form approved by the Corporation and the Trustee, duly executed by the registered owner hereof or by such owner's duly authorized attorney in writing, and thereupon the Corporation shall issue in the name of the transferee or transferees, and the Trustee shall authenticate and deliver, in exchange herefor, a new Debenture or Debentures for a like aggregate principal amount, and the transfer hereof shall be valid unless made as provided in the Indenture, or unless the Corporation, or the Trustee, or the registrar (if any) shall be affected by notice that such transfer is fraudulent or otherwise improper.

The Corporation, the Trustee, any paying agent and any Debenture registrar may deem and treat the registered owner hereof as the absolute owner of this Debenture (whether or not this Debenture shall be overdue and notwithstanding any notation of ownership or other writing hereon made by anyone other than the Corporation or any Debenture registrar) for the purpose of receiving payment hereof or on account hereof and for all other purposes, and neither the Corporation nor the Trustee nor any paying agent nor any Debenture registrar shall be affected by any notice to the contrary.

No recourse under or upon any obligation, covenant or agreement contained in the Indenture or in any indenture supplemental thereto, or in any Debenture, or because of any indebtedness evidenced thereby, shall be had against any incorporator, or against any past, present or future shareholder, officer or director, as such, of the Corporation or of any successor corporation, either directly or through the Corporation or any successor corporation, under any rule of law, statute or constitutional provision or by the enforcement of any assessment or by any legal or equitable

NATIONAL THEATRES, INC.

5½% SINKING FUND SUBORDINATED DEBENTURE

DUE MARCH 1, 1974

NATIONAL THEATRES, INC., a Delaware corporation (herein called the "Corporation"), for value received, hereby promises to pay to -HAROLD GOLDMAN- , or registered assigns, at the office or agency of the Corporation in the Borough of Manhattan, The City of New York, the principal sum of

ONE HUNDRED DOLLARS

on March 1, 1974, in such coin or currency of the United States of America as at the time of payment shall be legal tender for the payment of public and private debts, and to pay interest on said principal sum at the rate of 5½% per annum at said office or agency, in like coin or currency from the date hereof, quarterly on June 1, September 1, December 1 and March 1 of each year, until payment of said principal sum has been made or duly provided for.

This Debenture is one of a duly authorized issue of debentures of the Corporation, designated as its 5½% Sinking Fund Subordinated Debentures Due March 1, 1974 (herein referred to as the "Debentures"), of an aggregate principal amount of $20,000,000, issued or to be issued under and pursuant to an indenture dated as of December 1, 1958 (herein referred to as the "Indenture"), duly executed and delivered by the Corporation to Chemical Corn Exchange Bank, Trustee (herein referred to as the "Trustee"). Reference is hereby made to the Indenture and all indentures supplemental thereto for a description of the rights, limitations of rights, obligations, duties and immunities thereunder of the Trustee, the Corporation and the holders of the Debentures.

In case an Event of Default, as defined in the Indenture, shall have occurred and be continuing, the principal hereof and of all Debentures issued under the Indenture may be declared, and upon such declaration shall become, due and payable in the manner, with the effect, and subject to the conditions, provided in the Indenture.

The indebtedness represented by the Debentures is expressly subordinated, to the extent and in the manner set forth in the Indenture, to the right of payment to the prior payment in full of all Senior Indebtedness, as defined in the Indenture, and each holder of the Debentures, by accepting the same, agrees to and shall be bound by the provisions of the Indenture with respect to subordination. The Indenture provides that each holder of a Debenture by his acceptance thereof authorizes and directs the Trustee on his behalf to take such action as may be necessary or appropriate to acknowledge or to effectuate the subordination as provided in the Indenture and appoints the Trustee his attorney in fact for any and all such purposes.

No reference herein to the Indenture and no provision of the Debentures or of the Indenture shall alter or impair the obligation of the Corporation, which is absolute and unconditional, to pay the principal of, premium, if any, and interest on this Debenture at the place, at the respective times, at the rate and in the currency herein prescribed.

The Debentures are issuable as registered Debentures without coupons, in the denominations of $100, $500 and $1,000 and any multiple of $1,000. As provided in the Indenture and upon payment of charges as therein provided, the Debentures are exchangeable for other Debentures of any other authorized denomination or denominations of an equal aggregate principal amount, as requested by the holder surrendering the same at the office or agency of the Corporation in said Borough of Manhattan, provided, however, that Debentures may not be exchanged for Debentures of a lower denomination when such lower denomination is less than $500.

The Debentures are subject to redemption on and after March 1, 1960 as a whole or in part, at any time or times at the option of the Corporation, upon not less than 30 nor more than 45 days' notice, given as provided in the Indenture, at 101% of the principal amount thereof redeemed if redeemed during the twelve months' period beginning March 1, 1960 at 102% of the principal amount thereof redeemed if redeemed during the twelve months' period beginning March 1, 1961, at 101% of the principal amount thereof redeemed if redeemed during the twelve months' period beginning March 1, 1962, and thereafter at 100% of the principal amount thereof redeemed, together in each case with accrued interest to the date fixed for redemption.

The Debentures are also annually subject to redemption quarterly, pursuant to the terms of the sinking fund provided in the Indenture, on notice as set forth above, at 100% of the principal amount thereof, without premium, together with accrued interest to the date fixed for redemption.

The Indenture contains provisions permitting the Corporation and the Trustee, with the consent of the holders of not less than 66⅔% in aggregate principal amount of the Debentures at the time outstanding, evidenced as in the Indenture provided, to execute supplemental indentures adding any provisions to or changing in any manner or eliminating any of the provisions of the Indenture or any supplemental indenture or modifying in any manner the rights of the holders of the Debentures, provided, however, that no such supplemental indenture shall (i) extend the fixed maturity of any Debentures, or reduce the principal amount thereof, or reduce the rate or extend the time of payment of interest thereon, or reduce any premium payable upon the redemption thereof, without the consent of the holder of each Debenture so affected, or (ii) reduce the aforesaid percentage of Debentures, the consent of the holders of which is required for any such supplemental indenture, without the consent of the holders of all Debentures then outstanding. Any such consent by the holder of this Debenture (unless revoked as provided in the Indenture) shall be conclusive and binding upon such holder and upon all future holders and owners of this Debenture and of any Debenture issued in exchange or substitution hereof, irrespective of whether or not any notation of such consent is made upon this Debenture.

This Debenture may be transferred upon surrender at the office or agency of the Corporation in the Borough of Manhattan, The City of New York, for cancellation, accompanied by a written instrument of transfer in form approved by the Corporation and the Trustee, duly executed by the registered owner hereof or by attorney duly authorized in writing, and thereupon the Corporation shall issue in the name of the transferee or transferees, and the Trustee shall authenticate and deliver, in exchange hereof, a new Debenture or Debentures for a like aggregate principal amount and the transfer hereof shall be valid unless made as provided in the Indenture, or unless, at such agency, by the registered owner hereof or by his attorney duly authorized in writing.

The Corporation, the Trustee, any paying agent and any Debenture registrar may deem and treat the registered owner hereof as the absolute owner of this Debenture (whether or not this Debenture shall be overdue and notwithstanding any notation of ownership or other writing hereon made by anyone other than the Corporation or any Debenture registrar) for the purpose of receiving payment hereof as set forth herein and for all other purposes, and neither the Corporation nor the Trustee nor any paying agent nor any Debenture registrar shall be affected by any notice to the contrary.

No recourse under or upon any obligation, covenant or agreement contained in the Indenture or in any indenture supplemental thereto, or in any Debenture, or because of any indebtedness evidenced thereby, shall be had against any incorporator, or against any past, present or future stockholder, officer or director, as such, of the Corporation or of any successor corporation, either directly or through the Corporation or any successor corporation, under any rule of law, statute or constitutional provision or by the enforcement of any assessment or by any legal or equitable proceeding or otherwise, all such liability being expressly waived and released by the acceptance of this Debenture and as part of the consideration for its issuance, provided, however, that nothing herein or in the Indenture contained shall be taken to prevent recourse to and the enforcement of the liability, if any, of any stockholder or subscriber to stock upon or in respect of shares of stock not fully paid.

This Debenture shall not be valid or become obligatory for any purpose until the certificate of authentication hereon shall have been signed by the Trustee under the Indenture.

IN WITNESS WHEREOF, NATIONAL THEATRES, INC. has caused this Debenture to be signed manually or by facsimile by its President or a Vice President and by its Secretary or an Assistant Secretary, and has caused a facsimile of its corporate seal to be affixed hereunto or imprinted hereon.

Dated 1 3

NATIONAL THEATRES, INC.

Attest

Laurence S. Peters
Secretary

By

John D. Stern
President

NATIONAL THEATRES CORPORATE SEAL 1952 DELAWARE

FOR VALUE RECEIVED, the undersigned sells, assigns and transfers unto

the within Debenture of NATIONAL THEATRES, INC. and does hereby irrevocably constitute

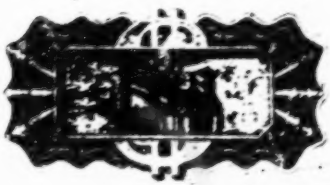
and appoint Attorney
to transfer said Debenture on the books of the Corporation at the office or the agency of the Corporation, with full power of substitution in the premises.

Dated

C10

NATIONAL THEATRES, INC.

5 1/2% SINKING FUND SUBORDINATED DEBENTURE DUE MARCH 1, 1974



PRINCIPAL DUE

ON THE FIRST DAY OF

MARCH, 1974

INTEREST PAYABLE QUARTERLY

ON THE FIRST DAYS OF

JUNE, SEPTEMBER, DECEMBER AND MARCH

PRINCIPAL AND INTEREST PAYABLE AT THE OFFICE OR AGENCY OF THE CORPORATION IN THE BOROUGH OF MANHATTAN THE CITY OF NEW YORK STATE OF NEW YORK

FEDERAL REVENUE STAMPS ON THIS DEBENTURE AS REQUIRED BY LAW HAVE BEEN AFFIXED TO THE WITHIN MENTIONED INDENTURE AND HAVE BEEN DULY CANCELLED

TRUSTEE'S CERTIFICATE OF AUTHENTICATION

This is one of the Debentures described in the within-mentioned Indenture.

CHEMICAL CORN EXCHANGE BANK
as Trustee

By _____
Authorized Officer

APPENDIX D

Ex Parte Order of Sequestrator Granted to Appellees on April 3, 1961

ORDER

(No. 1438.)

On this 3rd day of April, A. D. 1961, it appearing that defendants B. GERALD CANTOR, EUGENE V. KLEIN, JOE BENARON, JOHN B. BERTERO, SAMUEL FIRES, WILLIAM J. FRIEDMAN, WILLIAM H. HUDSON, WILLARD W. KEITH, RICHARD W. MILLAR, JACK M. OSTROW, GRAHAM L. STERLING, JR., CHARLES A. BARKER, JR., ELY A. LANDAU, OLIVER A. UNGER, are non-residents of the State of Delaware, having property in the State of Delaware.

IT IS, upon motion of Irving Morris, attorney for plaintiff, ORDERED as follows:

1. Said defendants shall appear in this Court and answer the complaint on or before May 22, 1961, and a summons shall issue directing them to appear on said date. On or before April 10, 1961, the Register shall send to each of the aforesaid named defendants at his last known post office address set forth in the affidavit of Milton Paulson, Esq., filed herein, a copy of the summons, complaint and of this order. The Register shall cause a copy of this order to be published in a newspaper in the City of Wilmington, New Castle County, State of Delaware, once a week for three successive weeks, commencing the week following the entry of this order.

2. Lawrence F. Hartnett of Wilmington, Delaware, is hereby appointed sequestrator to seize and hold, pursuant to the succeeding terms of this order, property of each of the aforesaid named defendants in the State of

Delaware, consisting of shares of stock, options on shares of common stock and debentures of NATIONAL THEATRES & TELEVISION, INC., a Delaware corporation.

3. The Sequestrator shall have the power to seize the shares of stock, options on shares of common stock and debentures of NATIONAL THEATRES & TELEVISION, INC. standing in the name of each of the aforesaid named defendants, or in or to which they may have or hold any right, title or interest, with all the rights belonging or appertaining to the aforesaid shares, options and debentures. Said shares of stock, options and debentures and all rights thereunto belonging or appertaining may be sold under an order of this Court to pay the demand of the plaintiff in this cause if the aforesaid named defendants shall not appear or shall otherwise default.

4. In the event that any of the aforesaid named defendants shall make a bona fide sale or sales of any of his shares, options or debentures, seized hereunder and shall receive therefor not less than the market price at the time of said sale and shall deposit with the sequestrator the proceeds of such sale or sales, the sequestrator shall forthwith advise NATIONAL THEATRES & TELEVISION, INC. of such fact and thereupon the shares and options sequestered and seized and so sold shall be released from such sequestration and seizure without further action of any kind by the sequestrator or this Court, and in such event the proceeds of any such sale shall be held by the sequestrator until further order of this Court in lieu of the shares, options, or debentures initially seized and so sold; provided further that the proceeds of any such sale or sales shall be subject to investment and reinvestment by the sequestrator in such property and upon such terms and conditions as the aforesaid named defendants may,

from time to time, direct in writing, provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any sale of such property) shall be held by and in the name of the sequestrator pursuant to the terms of this order and until further order of this Court.

5. The sequestrator shall forthwith notify NATIONAL THEATRES & TELEVISION, INC. through its resident agent in Delaware, The Prentice-Hall Corporation Systems, Inc., 229 South State Street, Dover, Delaware, of his appointment as such sequestrator, shall demand of and from said corporation through its said resident agent a statement of the number of shares of stock, options or debentures owned or standing in the name of each of the aforesaid named defendants, or in or to which each of the aforesaid named defendants has any right, title or interest, with the number or numbers of the certificate or certificates or other marks distinguishing same and the date said certificates, options or debentures were issued, and all rights of every kind thereunto belonging or appertaining; shall notify NATIONAL THEATRES & TELEVISION, INC. through its said resident agent, to make entries on the proper books of NATIONAL THEATRES & TELEVISION, INC., showing that the shares of stock or options or debentures held or owned or standing in the name of the aforesaid named defendants or held beneficially for them, and the rights or interests therein are held by such sequestrator. The sequestrator shall further demand notification that said entries on said books have been made; and in general and subject to the provisions of paragraph "4" hereof, he shall do all acts necessary to hold and preserve the said shares of stock, options and debentures and all right or interest therein until further order of this Court.

6. The sequestrator shall qualify by filing in this Court a bond which need only be executed by the surety in the sum of One Thousand ($1,000.) Dollars with United States Fidelity and Guaranty Company, a Maryland corporation, as surety. The condition of said bond shall be that the sequestrator shall well and truly perform the duties of his office and shall duly account for all property which may come into his hands as such sequestrator.

7. Plaintiff shall file in this Court a bond in the sum of One Thousand ($1,000.) Dollars, with United States Fidelity and Guaranty Company, a Maryland corporation, as surety, which bond need only be executed by the surety. The condition of said bond shall be that plaintiff will abide with any order of this Court respecting the property herein ordered to be seized and sequestered.

/s/ Collins J. Seitz.
Chancellor.

Office Supreme Court, U.S.
FILED
JUN 22 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 160

ELY A. LANDAU,

Appellant,

v.

JOSEPH BEST, EVELYN BEST, ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

MOTION TO DISMISS

ROBERT ROY DANN,
Attorney for Appellees,
Office & P. O. Address,
122 East 42nd Street,
New York 17, New York.

DENNIS S. ARONOWITZ,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1132

ELY A. LANDAU,

Appellant,

v.

JOSEPH BEST, EVELYN BEST, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

MOTION TO DISMISS

Appellees in the above entitled case move to dismiss the appeal herein on the grounds that a substantial federal question is not present and the order appealed from lacks finality.

Statement of Case

This is a direct appeal from a decision and mandate of the Supreme Court of Delaware (App. A of Jurisdictional Statement) affirming the decision of the Chancery Court of the State of Delaware in and for New Castle County (App. A of Jurisdictional Statement) which denied a motion by appellant to vacate an order of sequestration

(App. D of Jurisdictional Statement) issued pursuant to Section 366 of Title 10 of the Delaware Code (App. B of Jurisdictional Statement).

The order appealed from arises out of two consolidated stockholders' derivative actions brought in the right and for the benefit of National Theatres & Television, Inc. (formerly National Theatres, Inc., now National General Corporation), a Delaware corporation. The actions were commenced by the filing in the Court of Chancery for New Castle County of complaints which named as a defendant this appellant, a non-resident of the State of Delaware and a former director of National Theatres & Television, Inc. Thereafter, an order of sequestration was entered by the Court of Chancery, appointing a sequestrator and empowering him to seize "debentures of National Theatres & Television, Inc. standing in the name of each of the aforesaid named defendants, or in or to which they may have or hold any right, title or interest, with all the rights belonging or appertaining to the aforesaid * * * debentures."

The order further provided that:

> "Said * * * debentures and all rights thereunto belonging or appertaining may be sold under an order of this Court to pay the demand of the plaintiff in this cause if the aforesaid named defendants shall not appear or shall otherwise default."

The order of sequestration directed the Register of the Chancery Court to send a copy of the summons, complaint and the order to appellant at his last known address and to have published a copy of the order in a Wilmington newspaper once a week for three successive weeks.

On May 3, 1961 the Sequestrator filed a report with the Court of Chancery in which he stated that he had seques-

tered $421,000. in principal amount of debentures of National Theatres & Television, Inc. registered in the name of appellant. The sequestration was effected by the seizure on the books of the corporation of the debt owed to appellant. The certificates of debenture issued to appellant were not seized physically.

On May 29, 1961 appellant, appearing specially, moved in the Court of Chancery to vacate the sequestration on the ground that the Court lacked power to seize the debt evidenced by the certificates of debenture which appellant asserted were negotiable instruments under the law of the State of New York.[1] The motion was denied in an unreported opinion of the Chancery Court (App. A of Jurisdictional Statement) in which the Court held that under the law of New York the certificates of debenture evidencing the debt were not negotiable instruments and, therefore, the underlying debt was subject to sequestration in Delaware, the domicile of the debtor corporation.

The decision of the Chancery Court was appealed to the Supreme Court of Delaware and was affirmed in a unanimous decision and opinion dated December 13, 1962. On December 27, 1962 the Supreme Court of Delaware issued its Mandate affirming the decision below and thereby returning the cause to the Chancery Court in and for New Castle County.

Argument.

Despite the fact that appellant's Jurisdictional Statement is replete with such terminology as "full faith and credit" and "due process of law under the Fourteenth

1. Appellant and appellees have at all times agreed that by the terms of the indenture agreement under which the debentures were issued the question of whether the certificates of debenture are negotiable instruments is governed by New York law.

Amendment", he has failed utterly to demonstrate that any substantial federal question was raised in the Court below involving either the constitutionality of any state statute, or the failure of the Delaware Courts to give full faith and credit to the laws of the State of New York, or an act of the Delaware Courts depriving appellant of property without due process of law. The sole issue before the Court below was accurately stated by appellant in the Statement of Issues in the reply brief which he filed with the Supreme Court of Delaware, as follows:

> "Thus, only one issue now remains before this Court: Whether registered corporate bonds are negotiable under the laws of the State of New York or, to put it another way, whether they are within the scope of the Hofstadter Act, which is entitled to full faith and credit in the courts of this State."

The Supreme Court of Delaware, agreeing fully with this statement of the issues, rendered a unanimous decision in which it applied New York law and found that under the Hofstadter Act (New York Personal Property Law §§ 260-262) and the decisions of the New York Courts, the debentures in question are non-negotiable and therefore subject to sequestration in Delaware, the state of incorporation of the debtor.

Appellant did not contend below that the statute under which the order of sequestration was issued (10 Delaware Code § 366) offends the Constitution or laws of the United States as applied in this case. *Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256 (1920). Moreover, his assertion that the Delaware Courts failed to give full faith and credit to the law of New York, where it is apparent that the Courts below specifically applied the law of New York to the question before them, is without merit.

Further, this appeal is faulty by virtue of the lack of finality in the proceedings below in that the order appealed from does not conclusively dispose of the litigation and contemplates further proceedings in Chancery Court with respect to the debentures in question. Appellant's failure to demonstrate the finality of the order appealed from is in and of itself sufficient ground to dismiss this appeal.

Appellant has not raised a substantial Federal question

As the basis for this appeal appellant contends that the Delaware Courts failed to give full faith and credit to the law of New York. It is apparent that appellant misapprehends the nature and requirements of the full faith and credit clause.

The issue before the Courts below was not whether New York law should be applied, but whether under New York law these debentures were negotiable. This was a question merely of the construction of the law of a sister state and not one of full faith and credit. This Court has repeatedly held that where the Courts of one state recognize that the laws of another state govern a particular issue, full faith and credit has been satisfied and the question of the construction given to that law does not raise a substantial federal question. In *Glenn v. Garth*, 147 U. S. 360, at 368-9 (1893), this Court stated:

> "If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York court was against a right specially set up and claimed under the Constitution of the United States, or necessarily arising, but whether in that decision error intervened in the construction of the statutes

> of Virginia. If every time the courts of a State put a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

See, also,

Smithsonian Institution v. *St. John*, 214 U. S. 19 (1909);

Johnson v. *New York Life Insurance Co.*, 187 U. S. 491 (1903);

Banholzer v. *New York Life Insurance Co.*, 178 U. S. 402 (1900).

The Supreme Court of Delaware specifically held that New York law governed this question and after a thorough review of the decisional and statutory law concluded that under the law of New York these registered debentures are non-negotiable. This is not a failure to give full faith and credit to the laws of New York "* * * nor can the contention of counsel, that the * * * [New York] statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the Constitution or laws of the United States." *Glenn* v. *Garth*, *supra*, at 369-70.

Not a single case cited by appellant as authority for his right to appeal to this Court supports his contention that the Delaware Courts failed to give full faith and credit to the law of New York. With the exception of *Hughes* v. *Fetter*, 341 U. S. 609 (1951), none of the cases

relied upon by appellant involved the application of the full faith and credit clause. Furthermore, *Hughes* v. *Fetter, supra,* although involving a question of full faith and credit, provides no support for appellant since there the Courts of Wisconsin expressly refused to recognize a right granted by the law of another state.

Likewise, appellant's attempt to convert this question into one involving due process of law under the Fourteenth Amendment is equally without merit. Contrary to appellant's contention, the purpose of the Delaware sequestration statute (10 Delaware Code §366), under which the order of sequestration was issued, is to compel appearance by a non-resident defendant who has property within the state, and not, as appellant claims, "to enable the Delaware Court to enter a default judgment and direct the sale of the debentures thus seized." (Jurisdictional Statement, pp. 5-6.) See *Sands* v. *Lefcourt Realty Corp.*, 35 Del. Ch. 340, 117 A. 2d 365 (1955); *Weinress* v. *Bland*, 31 Del. Ch. 269, 71 A. 2d 59 (1950).

Appellant does not claim that it would be a deprivation of his federal rights for a state to assign under its law the status of non-negotiability to registered corporate debentures. In fact, implicit throughout these proceedings is the concession by appellant that it is proper for and within the discretion of New York to classify, by statute or judicial decision, debentures of the type involved here as non-negotiable. Furthermore, at all stages of the proceedings below appellant has conceded the power of Delaware to seize the debt owed by the corporation if the certificates of debenture are non-negotiable. See *Harris* v. *Balk*, 198 U. S. 215 (1905).

In addition, the Courts below recognized that under the decision of this Court in *Bank of Jasper* v. *First National Bank of Rome*, 258 U. S. 112 (1922), they would lack

power to seize the debt in Delaware if the debentures are negotiable under New York law. Therefore, appellant's assertion of deprivation of property without due process of law is in reality nothing more than a claim that the Courts below were in error in their construction of the law of New York. This does not raise a substantial federal question. Nor does the assertion of deprivation of due process under the circumstances presented call into question the validity of a statute as is required for direct appeal to this Court under §1257(2) of Title 28, United States Code.

Finally, it is submitted that the decision of the Supreme Court of Delaware was so eminently correct as to render frivolous appellant's contentions as they appear at pages 11 through 18 of the Jurisdictional Statement. Appellees can add nothing to the thoroughness with which the Court below considered the question before it and willingly rest their claim that a substantial federal question is not present here upon the opinion below.

However, appellees would be remiss in their duty to the Court if they did not point out a significant omission in appellant's analysis of the provisions of the New York Personal Property Law as contained in his Jurisdictional Statement. At page 12 appellant contends that subdivision 2 of Section 261 of the New York Personal Property Law makes negotiable a "'corporate bond which, by its terms, entitles a person named therein to the benefits thereof * * *'." He totally ignores the remainder of that sentence which reads, "* * *" and which provides; in substance, *that title thereto is transferable with the same effect as in the case of a negotiable instrument*, may be transferred by delivery thereof by any person in possession of the same, howsoever such possession may have

been acquired if endorsed in blank, or if it is endorsed to a specific person and the delivery is made to such person." (Emphasis added.)

It is this latter portion of subdivision 2 of Section 261 which is the touchstone of the inquiry here. Although appellant refers to the debentures as registered bonds, he also chooses to ignore the terms of the debentures (App. C of Jurisdictional Statement) which make them assignable only on the books of the corporation and not by delivery of the certificates themselves. This requirement prevents the debentures in question from being classified as negotiable instruments under the very statute relied upon by appellant.

The order appealed from lacks finality

Despite appellant's characterization of the decision and mandate of the Court below as final, it is readily apparent that the order appealed from lacks the quality of finality required for an appeal to this Court. See *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948). The order below was neither a final judgment nor a final decree. It did not dispose of this litigation, nor did it result in a final determination of appellees' right to the entry of judgment against appellant. Of prime importance, the order appealed from did not establish the right of the sequestrator to sell the debentures in question, nor did it establish appellees' right to receive the proceeds of such sale.

Section 366 of Title 10 of the Delaware Code specifically provides that if a defendant does not appear, or otherwise defaults, the property sequestered "*may* be sold under the order of the Court to pay the demand of the plaintiff * * *." (Emphasis added.) Prior to the entry of judgment and an order of sale, the property is held by the Court.

in custodia legis and title is not vested in the sequestrator, who acts merely as agent of the Court to hold possession of the property under the direction of the Court. *Weinress* v. *Bland*, 31 Del. Ch. 269, 71 A. 2d 59 (1950).

The mandate of the Supreme Court of Delaware, affirming the decision below, contemplates a remand of the action to the Chancery Court for further discretionary action. Only upon appellant's failure to appear in the action[2] and a default judgment having been entered, will the Chancery Court then have to decide whether to enter an order directing a sale of the debentures. This is more than a mere ministerial act. See *Loeber* v. *Schroeder*, 149 U. S. 580 (1893). The order which appellant characterizes as final is merely an interlocutory or intermediate step in this litigation and presupposes further action of a discretionary and final nature. *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U. S. 548, 551 (1945). As such, it lacks finality and is not ripe for review by this Court.

2. Appellant's time to appear in this action has been extended by stipulation until 10 days after this Court enters an order disposing of this appeal.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

ROBERT ROY DANN,
Attorney for Appellees.

DENNIS S. ARONOWITZ,
Of Counsel.